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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AIDEN STOCKMAN; NICOLAS TALBOTT; TAMASYN REEVES; JAQUICE TATE; JOHN DOES 1-2; JANE DOE; and EQUALITY CALIFORNIA,

Plaintiffs,

v.

DONALD J. TRUMP, et al.

Defendants.

CASE NO. 5:17-CV-01799-JGB-KK

PLAINTIFFS' JOINT OPPOSITION TO MOTION TO DISSOLVE THE PRELIMINARY INJUNCTION

Assigned to The Hon. Jesus G. Bernal

Date: May 14, 2018
Time: 9:00 a.m.
Place: Courtroom 1

STATE OF CALIFORNIA,
Plaintiff-Intervenor,

v.

DONALD J. TRUMP, et al.

Defendants.

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I. INTRODUCTION

Following this Court's Order (the "Order," Dkt. No. 79) preliminarily enjoining Defendants from excluding transgender individuals from military service, on March 23, 2018, Defendants announced a plan to implement that ban (the "Implementation Plan," Dkt. No. 83-1), and filed a motion to dissolve the preliminary injunction ("Motion," Dkt. No. 82). The Implementation Plan is not a "new" policy. It is a plan for implementing the very ban this Court enjoined.

In their Motion, Defendants contend that *Plaintiffs* have the burden to establish their continuing entitlement to preliminary injunctive relief. That is incorrect. Under well-settled law, a party seeking to dissolve a preliminary injunction must show that as a result of changed circumstances the underlying bases for the injunction no longer exist.

Far from making that required showing, Defendants' Motion confirms that nothing has changed. As the District Court for the Western District of Washington recently concluded, "the 2018 Memorandum and the Implementation Plan do not substantively rescind or revoke the Ban [set forth in the August 25 Trump Memorandum[1]], but instead threaten the very same violations that caused it and other courts to enjoin the Ban in the first place." *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *6 (W.D. Wash. Apr. 13, 2018). Defendants have shown no reason why maintaining the status quo—which has been in place for current service members for nearly two years—would cause them any significant harm, or indeed any harm at all, while this litigation proceeds. Defendants' Motion should be denied.

II. RELEVANT BACKGROUND

A. The Transgender Service Member Ban

In June 2016, the United States Department of Defense ("DOD") adopted a policy permitting transgender people to serve in the military. (Dkt. 23-3.) This

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[1] *Military Service by Transgender Individuals*, 82 Fed. Reg. 41319 (Aug. 30, 2017) ("August 25 Trump Memorandum") (Dkt. No. 28-7).

policy followed a lengthy review process by senior civilian and uniformed military leaders, which included extensive discussions with commanders and service members, a study by the RAND Corporation, and consideration of the experiences of other nations that allow service by transgender individuals. (*See, e.g.*, Dkt. No 26 ¶ 10.) The DOD review determined that there was no valid reason to exclude qualified personnel from military service simply because they are transgender. (*See, e.g.*, *id.* ¶¶ 19-20.)

In July 2017, President Donald J. Trump announced via Twitter that "the United States Government will not accept or allow . . . Transgender individuals to serve in any capacity in the U.S. Military." (*See* Dkt. No. 28-6.) In August 2017, President Trump formalized the ban into an executive directive. (*See* August 25 Trump Memorandum, Dkt. 28-7.)

On September 5, 2017, Plaintiffs filed this lawsuit challenging the constitutionality of the ban and moved for a preliminary injunction to prevent its implementation. (Dkt. Nos. 1, 15.) Plaintiffs alleged that the ban denies them equal protection of the laws, their right to liberty and privacy, and their right to freedom of expression in violation of the United States Constitution. Plaintiffs argued that Defendants lacked any rational basis for imposing the ban—much less a basis that would survive the heightened scrutiny applicable to discrimination against transgender people. (Dkt. No. 15 at 15-22.) In response, Defendants argued that the President's decision was entitled to deference. (Dkt. No. 36 at 25.) Defendants also argued that Plaintiffs' claims were not ripe for adjudication, because "the policy Plaintiffs assail is still being studied, developed, and implemented." (*Id*. at 15, 23.)

In December 2017, this Court—along with three other federal courts—ruled that Plaintiffs had established a likelihood of success on their claim that President Trump's ban violates equal protection, that Plaintiffs would be irreparably harmed absent preliminary injunctive relief, and that the public interest and balance of hardships weighed in favor of granting injunctive relief. (Order, Dkt. No. 79 at 21.)

The Court rejected Defendants' contention that the case was not ripe for review, holding that "President Trump has unambiguously stated his policy intentions, then formalized those intentions into an operative Presidential Memorandum." (*Id.* at 17.)

The Court preliminarily enjoined Defendants from "excluding individuals . . . from military service on the basis that they are transgender" and confirming that "[n]o current service member . . . . may be separated, denied reenlistment, demoted, denied promotion, denied medically necessary treatment on a timely basis, or otherwise subjected to adverse treatment or differential terms of service on the basis that they are transgender." (*See* Order, Dkt. No. 79 at 21.) The effect of the Order is to keep in place the status quo that existed before the President's tweets and the August 25 Trump Memorandum.

B. The Implementation Plan And President Trump's March 23 Memorandum

The August 25 Trump Memorandum ordered Secretary of Defense James Mattis to submit "a plan for implementing" the President's directive by February 21, 2018. (Dkt. No. 28-7.) Secretary Mattis delivered his proposed Implementation Plan to the President on February 22, 2018. (Implementation Plan, Dkt. No. 83-1 at 1.)

The Implementation Plan (1) requires transgender individuals to serve only "in their biological sex," and (2) bans transgender persons from military service if they "require or have undergone gender transition." (Implementation Plan, Dkt. No. 83-1, at 2-3.)

In accordance with the President's instruction to "determine how to address transgender individuals currently serving in the United States military" (August 25 Trump Memorandum, Dkt. No. 28-7, § 3), the Implementation Plan also contains a "grandfather" clause, which permits service members diagnosed with gender dysphoria by military medical personnel since the open service policy went into

effect in July 2016 and before the effective date of the Implementation Plan, to "continue to serve in their preferred gender and receive medically necessary treatment for gender dysphoria." (Implementation Plan, Dkt. No. 83-1 at 3.) Defendants have reserved the right to rescind this provision, stating that "should [DOD's] decision to exempt these Service members be used by a court as a basis for invalidating the entire policy, this exemption is and should be deemed severable from the rest of the policy." (DOD Report, Dkt. No. 83-2 at 43.)

President Trump accepted the Implementation Plan in a memorandum issued on March 23, 2018, in which he also "revoked" his August 25 Memorandum. (March 23 Trump Memorandum at 1, Dkt. No. 83-3.) Defendants now move to dissolve this Court's preliminary injunction in order to enforce the Implementation Plan.

III. ARGUMENT

It is the "party seeking modification or dissolution of an injunction" who "bears the burden of establishing that a *significant change* in facts or law warrants revision or dissolution of the injunction." *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000) (emphasis added); *see also Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 15 F.3d 1222, 1229 (1st Cir. 1994) (cited by Defendants, Motion at 7) (explaining that a "decision to vacate an existing preliminary injunction" is "a substantial change in the status quo").

Defendants cannot meet that burden here. Defendants contend that Plaintiffs' claims are moot because the August 25 Trump Memorandum has been revoked and replaced by a "new" policy set forth in the Implementation Plan. (Motion at 7.) That is wrong: the Implementation Plan and the ban on military service by openly transgender persons it prescribes are the fulfillment of the President's directive, not a departure from it. *See Karnoski*, 2018 WL 1784464, at *11-14.

Defendants also contend that, even if Plaintiffs' claims are not moot, the purportedly "new" policy withstands constitutional scrutiny because it is supported

by the justifications set forth in the DOD Report. But as explained in Section B below, the government's asserted justifications cannot survive even rational basis review, much less the heightened scrutiny that applies in this case.

A. Plaintiffs' Claims Are Not Moot

"The burden of demonstrating mootness 'is a heavy one.'" *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953)). Defendants fail to carry their burden, for two reasons. First, the Implementation Plan continues the same unconstitutional policy that the Court's Order enjoined. The Implementation Plan is part of a seamless course of conduct following from the President's 2017 tweets and the August 25 Trump Memorandum.

Second, even if the Implementation Plan were entirely independent of the President's orders, this action still would not be moot. It is well settled that a defendant's voluntary cessation of a challenged policy does not moot a claim unless it "is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *McCormack v. Herzog*, 788 F.3d 1017, 1024 (9th Cir. 2015) (internal citations omitted). In the specific context here—where a government defendant issues a new policy to replace one that is the subject of a legal challenge—a case is not moot if the "new" policy still "disadvantage[s]" the plaintiffs "in the same fundamental way" as the original policy. *Ne. Fla. Chapter of Assoc. Gen. Contr. of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 (1993). Here, the Implementation Plan enacts substantially the same prohibition as the August 25 Trump Memorandum, is unconstitutional for the same reasons, and, if enforced, would inflict substantially the same injuries this Court's Order sought to prevent.

1. *The Implementation Plan Is The Same Ban Enjoined by This Court*

Defendants argue that Plaintiffs' claims are moot because the Implementation Plan constitutes a "new" policy that is separate and distinct from the August 25 Trump Memorandum. Both the process by which the Implementation Plan was developed and the substance of the policy it proposes rebut that claim.

a. The Purpose Of The Review Process Was To Develop A Plan For Banning Military Service By Transgender Persons And To Identify Justifications For Doing So

From the time President Trump announced his intention to reinstate a ban on military service by transgender people in July 2017, through the submission of the Implementation Plan on February 22, 2018, the government's actions and statements have shown that the purpose of the review process was—just as President Trump ordered—to develop a plan for excluding transgender people from military service and to identify justifications for doing so.

The August 25 Trump Memorandum directed Secretary of Defense Mattis to submit to the President, by February 21, 2018, "a plan for implementing" the policies and directives set out in the memorandum—*i.e.*, a prohibition on military service by transgender persons. (Dkt. 28-7.) Secretary Mattis responded that the Department had "received the [August 25, 2017] Presidential Memorandum" and that it would "carry out the President's policy direction." (Decl. of Adam Sieff in Supp. of Pls.' Opp. to Mot. to Dissolve ("Sieff Decl."), Ex. A).

Shortly thereafter, Secretary Mattis affirmed that DOD "will carry out the President's policy and directives" and will "comply with the Presidential Memorandum." (*Id.*) Secretary Mattis directed his staff to "develop[] an Implementation Plan on military service by transgender individuals, *to effect the policy and directives in [the] Presidential Memorandum*." (Sieff Decl., Ex. B (emphasis added).) Secretary Mattis described the process that DOD would

undertake to develop the plan in a September 14, 2017 memorandum setting forth "Terms of Reference" for "Implementation of [the] Presidential Memorandum on Military Service by Transgender Individuals" ("Terms of Reference"). (*Id.*) The Terms of Reference directed the Deputy Secretary of Defense and the Vice Chairman of the Joint Chiefs of Staff to assemble a panel drawn from the DOD and the Department of Homeland Security in order to conduct an "independent multi-disciplinary review and study of relevant data and information . . . *to inform the Implementation Plan*." (*Id*. (emphasis added).)

The Terms of Reference instructed the panel to comply with the directives in the August 25 Trump Memorandum. (*Id.*) In defining the panel's assignment with respect to enlistment, Secretary Mattis did not ask for a recommendation as to whether accession of transgender individuals should be allowed, but rather informed his subordinates that DOD had been "direct[ed]" to prohibit accessions. (*Id.*) The panel was asked to consider only how the "guidelines" for such a policy should be updated "to reflect currently accepted medical terminology." (*Id.*) Similarly, with respect to service by transgender individuals, the panel was told that DOD was required to "return to the longstanding policy and practice . . . that was in place prior to June 2016," *i.e.*, a ban. (*Id.*)

In February 2018, the DOD completed the process—on precisely the timeline directed by the August 25 Trump Memorandum—and Secretary Mattis submitted a plan to implement the President's directive.

b. The Implementation Plan Bans Transgender People From Military Service

The Implementation Plan, which addresses "Military Service by Transgender Persons," does not constitute a new or different policy. It prevents transgender individuals from serving consistent with their gender identity—including by excluding anyone who has who "require[s] or ha[s] undergone gender transition," and by requiring proof that an applicant is "stable" in their birth sex.

(Implementation Plan, Dkt. 83-1 at 2-3.) It is a prohibition against transgender persons serving in the military in both name and substance; it does not apply to non-transgender individuals at all.

Defendants' claim that the Implementation Plan is not a ban because it permits transgender people to serve in their birth sex has no merit. Just as a policy allowing Muslims to serve in the military if they renounce their faith would be a ban on military service by Muslims, a policy requiring transgender individuals to serve in their birth sex *is* a ban on transgender service. *See Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010) (rejecting purported distinction between targeting same-sex intimate conduct and discriminating against gay people).

Defendants' argument to the contrary is similar to the specious claim, uniformly rejected by courts, that laws limiting marriage only to male-female couples did not discriminate against gay people because a gay person could marry a person of the opposite sex. *See, e.g.*, *In re Marriage Cases*, 183 P.3d 384, 440-441 (Cal. 2008) (rejecting as "sophistic" the claim that such a law does not discriminate because "the marriage statutes permit a gay man or a lesbian to marry someone of the opposite sex, because making such a choice would require the negation of the person's sexual orientation"); *Kitchen v Herbert*, 961 F. Supp. 2d 1181, 1200 (D. Utah 2013) (finding that "plaintiffs' asserted right to marry someone of the opposite sex is meaningless"). The Implementation Plan thus puts into operation exactly what the President, on July 26, 2017, announced that he intended to do: It bars transgender individuals from serving consistent with their gender identity, thereby barring them from serving.

Defendants' attempt to portray the Implementation Plan as a "new" policy based on a medical condition (gender dysphoria) does not withstand scrutiny. "The Implementation Plan prohibits transgender people—including those who have neither transitioned nor been diagnosed with gender dysphoria—from serving, unless they are 'willing and able to adhere to all standards associated with their

biological sex.'" *Karnoski*, 2018 WL 1784464, at *13. The Implementation Plan does not exclude those with gender dysphoria; rather, regardless of whether a person has gender dysphoria, it excludes both service members and potential recruits who do not live in their birth sex—*i.e.*, people who are transgender. For example, the Implementation Plan bars accession by transgender people who no longer have gender dysphoria because they have successfully transitioned, while permitting service by persons with gender dysphoria so long they do not transition. In every instance, the operative consideration is not whether a person has gender dysphoria, but rather whether a person lives in their birth sex. For this reason, as the district court in *Karnoski* concluded, the Implementation Plan is no less a ban on military service by transgender people than the Presidential directive it implements:

> Requiring transgender people to serve in their "biological sex" does not constitute "open" service in any meaningful way, and cannot reasonably be considered an "exception" to the Ban. Rather, it would force transgender service members to suppress the very characteristic that defines them as transgender in the first place.

Karnoski, 2018 WL 1784464, at *12.

The Implementation Plan's limited exception for some current transgender service members does not change this mootness analysis because it, too, is a continuation of ban. The August 25 Trump Memorandum specifically recognized that the Implementation Pan might treat currently serving transgender service members differently, stating that, "[a]s part of the implementation plan," the Secretary "shall determine how to address transgender individuals currently serving in the United States military." (Dkt. 28-7.) Unlike other service members, this small group is permitted to serve only on sufferance—that is, only based on the military's conditional exception to its policy of generally deeming transgender people unfit to serve. *See also infra* § III.C (explaining why this exception does not even spare the current service members it applies to from suffering irreparable injuries).

2. *Even If The Implementation Plan Were A New Policy, This Action Would Not Be Moot*

As shown above, the Implementation Plan is not a newly adopted policy. It was created as part of a process established in the August 25 Memorandum, implements the prohibition directed by the Memorandum, harms Plaintiffs in substantially the same ways, and suffers from the same constitutional defects. Accordingly, the President's "revocation" of the August 25 Trump Memorandum has no legal or practical significance. Contrary to Defendants' argument, it does not moot Plaintiffs' claims. However, even if—contrary to all available evidence—the Implementation Plan *were* a new policy that was independently adopted to replace the August 25 Trump Memorandum, this case would not be moot. A defendant's voluntary cessation of a challenged policy does not moot the plaintiff's claim unless it "is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *McCormack v. Herzog*, 788 F.3d 1017, 1024 (9th Cir. 2015) (internal citations omitted). Here the allegedly wrongful behavior will predictably recur because the Implementation Policy discriminates "in the same fundamental way" as the August 25 Trump Memorandum. *City of Jacksonville*, 508 U.S. at 662; *see, e.g.*, *Nat. Res. Def. Council v. Cty. of Los Angeles*, 840 F.3d 1098, 1102 (9th Cir. 2016) (holding that action alleging violations of County's 2001 pollution discharge permit was not moot in light of revocation of 2001 Permit and replacement by a new 2012 Permit "because the County Defendants are still subject to receiving water limitations, which are substantially the same as the limitations in the 2001 Permit"); *Assoc'd. Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013) (holding that equal protection action challenging Caltrans' affirmative action program was "not moot" despite revocation and replacement of program because "Caltrans' new preference program is substantially similar to the

prior program and is alleged to disadvantage AGC's members 'in the same fundamental way' as the previous program").

Defendants' attempted reliance on *Department of Treasury v. Galioto*, 477 U.S. 556 (1986) (per curiam) is unavailing. In *Galioto*, the district court enjoined a federal law barring certain former patients from buying firearms, with no avenue for seeking individualized relief, while providing an avenue for such relief for convicted felons. *Id.* at 558. While the government's appeal was pending, Congress amended the law to permit anyone barred from buying firearms, for any reason, to seek individualized relief. *Id*. The Supreme Court held that the plaintiff's challenge was moot, since the disparate treatment of former patients had been entirely eliminated by the new law. *Id*. at 558-59. In contrast, the Implementation Plan presents the *same* equal protection issue and inflicts the *same* constitutional injury as the policy originally challenged by Plaintiffs and enjoined by this Court.

B. The Implementation Plan Cannot Withstand Constitutional Scrutiny

This Court has already determined that Plaintiffs are likely to succeed on their claim that excluding transgender people from military service violates the equal protection component of the Fifth Amendment's Due Process Clause.[2] Defendants seek to undermine that holding by arguing, as they did in opposing Plaintiffs' motion for a preliminary relief, that the Implementation Plan should be subject only to rational basis review and by claiming that their justifications are sufficient under that minimal standard. Neither argument has merit.

1. *The Implementation Plan Requires Heightened Scrutiny*

This Court has already held that "discrimination on the basis of one's transgender status is subject to intermediate scrutiny." Order, Dkt. No. 79 at 19; *see*

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[2] The Court has not yet addressed Plaintiffs' other claims. Though not pertinent here, Plaintiffs expressly reserve and maintain that they are independently entitled to full relief on the basis of each of these claims, as well.

also Doe 1 v. Trump, 275 F. Supp. 3d 167, 208 (D.D.C. 2017) (same); *Stone v. Trump*, 280 F. Supp. 3d 747, 768 (D. Md. 2017) (same); *Karnoski v. Trump*, 2017 WL 6311305, at *7 (W.D. Wash. Dec. 11, 2017) (same); *cf. Karnoski*, 2018 WL 1784464, at *20-24 (concluding upon further examination that such discrimination warrants strict scrutiny). Defendants have not shown any valid reason for this Court to reverse that ruling now.

Defendants claim that *Schlesinger v. Ballard*, 419 U.S. 498 (1975) supports their argument for a lower standard of review because it shows that *post hoc* justifications for sex-based discrimination are sufficient in military cases. (Motion at 11.) But *Schlesinger* held no such thing.[3] The Court based its opinion on its determination that, *at the time the statute at issue in the case was enacted*, Congress sought to compensate for the fact "that women line officers had less opportunity for promotion than did their male counterparts." *Id*. at 508. Far from relying on a *post hoc* justification, the Court looked to whether a sufficient justification for the law existed at the time of its enactment.

Defendants also claim that the Court is more deferential to the government's evidence in military cases. Specifically, Defendants contrast the Court's rejection of the government's evidence in *Craig v. Boren*, 429 U.S. 190 (1976) with its deference to the government's experts in *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). That argument misses the mark. *Craig* involved an equal protection challenge to a *facial* classification based on sex, while *Goldman* involved a First Amendment challenge to the application of a *facially neutral* military regulation regarding dress and appearance. As such, *Goldman* has little bearing on the equal protection question presented here.

Under controlling precedent, military policies that discriminate based on sex are subject to the same heightened scrutiny applied in other settings. *See Rostker v.*

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[3] Even if Defendants' post hoc justifications could be considered, they would not justify the policy challenged in this case. *See infra* § III.B.2.

Goldberg, 453 U.S. 57, 69-71 (1981) (declining "to apply a different equal protection test because of the military context"); *see also United States v. Virginia*, 518 U.S. 515, 531 (1996) (carefully scrutinizing the extensive statistical and expert evidence about gender-based differences proffered by the government to justify its exclusion of women from the Virginia Military Institute). The Ninth Circuit has also subjected the government's evidence to rigorous scrutiny when a military regulation infringes a due process right. *See Witt v. Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008) (remanding due process challenge for development of an evidentiary record on whether Don't Ask, Don't Tell statute "significantly furthers the government's interest and whether less intrusive means would achieve substantially the government's interest"); *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 911-23 (C.D. Cal. 2010), *vacated on other grounds as moot* 658 F.3d 1162 (9th Cir. 2011) (concluding that Don't Ask Don't Tell statute violated substantive due process after carefully examining both plaintiffs' and the government's evidence).

Defendants also claim that *Rostker* upheld a discriminatory law based on mere "administrative convenience." (Motion at 13.) In fact, however, the statute survived only because the Court found that the exclusion of women from the draft was "closely related to Congress' purpose" of registering only persons who would be eligible for combat. 453 U.S. at 79. Nothing in *Rostker* suggests that administrative convenience alone would have sufficed.

Defendants also contend that "the political branches have significant latitude to choose among alternatives in furthering military interests." (Motion at 12-14.) But in *Rostker*, the Court deferred to Congress only because Congress based its decision on extensive evidence about alternative policies. 453 U.S. at 72-73. Here, the only evidence the military considered was about how to justify and implement a preexisting ban. President Trump did not order the military to "choose among alternatives"; rather, he ordered the military to *implement his decision*. They have

now done so, and their Implementation Plan is entitled to no more deference than the President's original decree.

Finally, Defendants note that the Supreme Court tolerated "inconsistencies resulting from line-drawing" in *Goldman*. Again, however, in *Goldman*, the Court deferred to the Air Force's judgment about whether to create an exception to a facially neutral rule. In contrast, the policy here is facially discriminatory. On its face, it is a "transgender" policy and applies only to transgender people. As this Court has already determined, such a policy requires, and likely fails, heightened scrutiny.

2. *The Justifications For The Implementation Plan Are Not Rationally, Much Less Substantially, Furthered by Barring Transgender People from Military Service*

Under the heightened review this Court has concluded applies, the transgender military ban must at least be substantially related to an exceedingly persuasive justification. *Virginia*, 518 U.S. at 533. "The justification must be genuine, not hypothesized or invented post hoc in response to litigation." *Id*. As an initial matter, the justifications in the DOD Report fail that test because they were manufactured after the fact to justify an existing ban.

In addition, even in the ordinary equal protection case calling for the most deferential standard of review, there must minimally be a rational relationship between the classification and the object to be served. *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985). The DOD Report is so rife with misstatements, internal inconsistences, and distortions that the Implementation Plan fails even that minimal test, as set forth in the attached affidavits and more fully addressed below. But even taking the statements in the DOD Report at face value, the Implementation Plan cannot survive constitutional scrutiny under any level of review because the required connection between the interests asserted and the drastic solution of barring an entire group of persons from military service simply does not exist.

The Defendants claim that barring transgender service members advances three interests: (1) promoting military readiness, based on purported concerns about the deployability of transgender troops; (2) promoting unit cohesion, based on concerns about maintaining sex-based standards; and (3) lowering costs. None of these asserted interests justifies a special rule that applies only to transgender persons.

a. Banning Otherwise Qualified Transgender People From Military Service Does Not Further Military Readiness

Even on its own terms, the DOD Report shows that the Implementation Plan does not further the government's interest in military readiness. The DOD Report claims that barring transgender people is warranted because the medical treatments for gender transition result in reduced deployability. (Dkt. 83-2 at 34-37.) While deployability is an important concern, it does not justify a categorical bar of transgender people. The military already has universal deployment standards that service members must meet. (*See* Sieff Decl., Ex. C (Memorandum, Under Secretary of Defense, Personnel and Readiness, DOD Retention Policy for Non-Deployable Service Members (February 14, 2018)).) Those standards result in discharge where a service member is nondeployable "for more than 12 consecutive months, for any reason." (*Id.*) In light of that objective and generally applicable rule, there is no legitimate, much less important, reason for applying a special rule to transgender people based on "uncertain" predictions of future nondeployability. (*See* DOD Report, Dkt. No. 83-2 at 34).

As Plaintiffs' expert explains, "If a transgender service member's limited period of non-deployability complies with those generally applicable standards, there is no reason why the service member should be automatically discharged simply because they were receiving surgery for gender dysphoria as opposed to a different medical condition." (Decl. of Dr. George Brown in Supp. of Pls.' Opp. to Mot. to Dissolve ("Brown Decl.") ¶ 40)

Singling out transgender people for service based on speculation that some transgender people may become nondeployable is both dramatically overinclusive—excluding many people whose medical treatment will not render them nondeployable, possibly even for any time—and dramatically underinclusive in failing to recognize that many non-transgender people have medical needs that may result in extended periods of nondeployment. *See Crawford v. Cushman*, 531 F.2d 1114, 1123 (2d Cir. 1976) ("Why the Marine Corps should choose, by means of the mandatory discharge of pregnant Marines, to insure its goals of mobility and readiness, but not to do so regarding other disabilities equally destructive of its goals, is subject to no rational explanation."); *In re Levenson*, 587 F.3d 925, 933 (9th Cir. 2009) (Reinhardt, J.) (rejecting classification that was "drastically underinclusive").

The DOD Report's assertion that transgender people are more prone to suicidality and other mental health conditions including anxiety and depression suffers from the same logical flaw. (*See* Dkt. 83-2 at 23.) Under generally applicable enlistment criteria, all prospective military service members must undergo a rigorous examination to identify any preexisting mental health diagnoses that would preclude enlistment. Accordingly, there is no reason to single out transgender people for unique treatment because the military directly screens for those conditions. Anyone with a history of suicidal behavior—whether transgender or not—is barred from enlisting. (*See* DOD Instruction 6130.03 at Encl. 4.29(n).4 (Apr. 28, 2010) ("DODI 6130.03")[5].) Anyone with a history of anxiety or depression—whether transgender or not—is barred from enlisting unless, *inter alia*, they have been stable and without medical treatment for 24 consecutive months or 36 consecutive months respectively. (*See id.* at Encl. 4.29(f), (p).) As a result, any

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[4] On March 30, 2018, DOD issued new regulations, which will go into effect on May 6, 2018. This new regulation provides similar screens for anxiety, depression, and suicidality.

[5] DODI 6130.03 is accessible at: http://www.med.navy.mil/sites/nmotc/nami/arwg/Documents/WaiverGuide/DODI_6130.03_JUL12.pdf.

enlistee, whether transgender or not, is screened for these conditions. As above, concerns about deployment cannot justify singling out transgender individuals for exclusion when universal policies that screen for these concerns are already in place.[6]

The absence of a rational—much less substantial—connection between the ban and military readiness is underscored by the Implementation Plan's reversal of policy authorizing enlistment for transgender individuals who have completed gender transition and have no need of any further medical care beyond the same routine hormone therapy required by many other service members. (*See* Implementation Plan at 3, Dkt. No. 83-1.) To the extent the military is purportedly concerned about the deployability of transgender service members who may require transition-related surgeries, it makes no sense to exclude those who have already completed gender transition and have no need for such care.

These fatal defects in fit between Defendants' asserted interest in military readiness and the exclusion of transgender people are sufficient to show that the Implementation Plan cannot withstand constitutional review. In addition, however, the DOD Report is riddled with misstatements, internal inconsistencies, and distortions. For example, the DOD Report cites data from a military study for the proposition that service members with gender dysphoria are "eight times more likely to attempt suicide than Service members as a whole." (DOD Report, Dkt. No. 83-2 at 23.) As Dr. Brown explains, "In fact, the underlying data refer to "suicidal ideation," not actual suicide attempts. (Brown Decl. ¶ 21, Ex. H at 9.)

In addition, the DOD Report states that transgender people who undergo surgery may be nondeployable for extended periods of time, "perhaps even a year"

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[6] In response to the Implementation Plan and the DOD Report, the American Psychological Association stated that it "is alarmed by the administration's misuse of psychological science to stigmatize transgender Americans and justify limiting their ability to serve in uniform and access medically necessary health care." (*See* Brown Decl., Ex. C (APA Statement).)

and then cites as support for that conclusion typical recovery times for transition-related surgeries that range between only 2 weeks and 6 months. (DOD Report, Dkt. No. 83-2 at 35.) In fact, "there is no medical basis" for the Report's assertion that treatment for gender transition "could render a transgender service member non-deployable for a full twelve months." (Brown Decl. ¶ 41.)

Similarly, the DOD Report distorts evidence regarding the efficacy of treatments for gender transition. For example, the DOD Report cites a recent decision by the U.S. Department of Health & Human Services Center for Medicare and Medicaid Services ("CMS") for the proposition that there is "insufficient scientific evidence to conclude that [transgender medical] surgeries improve health outcomes for persons with gender dysphoria." (DOD Report, Dkt. No 83-2 at 26 n.82.) But to the contrary, the CMS report found that "surgical care to treat gender dysphoria is safe, effective, and not experimental." (Brown Decl. ¶ 17 (citing Ex. F to same).) Consistent with standard medical practice, the CMS report endorsed individualized treatment plans to treat gender dysphoria, the same approach currently in place. (Brown Decl., Ex. F.)

The DOD Report also misconstrues guidelines issued by the Endocrine Society regarding protocols for hormone therapy. (DOD Report, Dkt. No. 83-2 at 35.) The DOD Report states that "[t]transition-related treatment that involves cross-sex hormone therapy could render a servicemember nondeployable for a year." *Id.* According to one of the authors of the Endocrine Society guidelines who was consulted by the panel assembled by Secretary Mattis, "the initiation of hormone therapy or being on harmony therapy would not prevent a servicemember from carrying out their military duties." (*See* Decl. of Joshua D. Safer, MD, FACP in Supp. of Pls. Opp. to Mot. to Dissolve ("Safer Decl.") ¶ 17.) In fact, transgender people—like other service members who receive prescription medication on deployment—have been deploying across the globe for decades, and have been able to do so openly while receiving medical treatment for the past year and a half. (*See*

Decl. of Brad R. Carson in Supp. of Pls.' Opp. to Mot. to Dissolve ("Carson Decl.") ¶ 20.)

These misrepresentations are particularly egregious in light of the overwhelming medical consensus that the treatments for gender transition are highly effective. As the American Medical Association explained, "there is no medically valid reason—including a diagnosis of gender dysphoria—to exclude transgender individuals from military service," and the DOD Report "mischaracterized and rejected the wide body of peer-reviewed research on the effectiveness of transgender medical care." (*See* Brown Decl., Ex. D (AMA Letter to Secretary James Mattis).)

b. Banning Transgender People Is Not Rationally, Much Less Substantially, Related To Maintaining Sex-based Standards

Defendants' claim that permitting military service by transgender people is "incompatible with sex-based standards" fares no better. Permitting transgender men to serve as men and transgender women to serve as women does not disrupt the military's maintenance of sex-based standards in the few areas where they exist. Under the open service policy that went into effect in July 2016, a service member's sex for all purposes while in the military is determined by the DEERS marker. Changing the DEERS marker requires demonstration of completion of gender transition and requires a commander's approval, consistent with that commander's evaluation of "expected impacts on mission and readiness." (Dkt. No. 28-4 at 1.29(f).) This rigorous process creates a bright line rule that ensures the military can maintain sex-based standards, when appropriate, including with regard to the transgender men and women to whom the same standards also apply.

Defendants' argument boils down to a claim that, simply by existing as such, transgender people undermine sex-based standards. But if that claim were sufficient to justify barring all transgender people from military service, it would also justify their exclusion from any, and all, institutions that maintain sex-based criteria for

facilities, including schools, workplaces, public accommodations, and beyond. In effect, Defendants' claim would banish transgender people from public life.

Courts have overwhelmingly rejected the use of Defendants' rationale to justify discrimination against transgender individuals in other settings. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046-47 (7th Cir. 2017); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 724-26 (D. Md. 2018); *Doe v. Boyertown Area Sch. Dist.*, 2017 WL 3675418, at *52-53 (E.D. Pa. Aug. 25, 2017), *appeal docketed*, No. 17-3113 (3d Cir. Sept. 28, 2017); *Students & Parents for Privacy v. U.S. Dep't of Educ.*, 2016 WL 6134121, at *28-29 (N.D. Ill. Oct. 18, 2016), report and recommendation adopted by 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017). As these courts have recognized, permitting transgender individuals to live in accord with their gender identity does not undermine the existence of sex-based activities or facilities, nor does it threaten the privacy or safety interests of others.[7] The same analysis applies here.

To the extent Defendants claim there is anything different or unique about the military justifying a departure from this established precedent, that argument is belied by the military's successful implementation of extensive guidance and training since the adoption of the open service policy. (*See* Carson Decl. ¶ 29.) With nearly two years of experience integrating openly transgender people into the service, it is notable that Defendants present no evidence in support of their claims and rely instead on hypothetical and speculative rather than actual concerns. (*Id.*)

Tellingly, the "best illustration" Defendants can muster is a single commander who "was confronted with dueling equal opportunity complaints" arising from a

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[7] This Court should reject Defendants' claim that allowing transgender people access to sex-based facilities based on the sex designated by their DEERS marker exposes the military to liability. Not a single case supports that claim despite thousands of schools, employers, and public accommodations providing transgender men and women access to facilities consistent with their identities in jurisdictions with similar laws authorizing access to facilities based on sex.

conflict between a transgender woman and a non-transgender woman. (Motion at 19.) However, if the mere existence of a single conflict or complaint were sufficient to justify the exclusion of an entire group of people, then many other groups—including women, gay people, religious minorities, and many racial and ethnic groups—would likely be unable to serve.

c. Banning Transgender People From Military Service Is Not Rationally, Much Less Substantially, Related To Saving On Costs

Finally, the Defendants' cost-based justifications cannot survive review. Fatally, the report fails to demonstrate that there is any rational reason, much less a substantial one, to treat the medical costs incurred by transgender service members differently from the costs incurred by non-transgender service members. *See*, *e.g.*, *Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011) (where interest in "cost savings and reducing administrative burdens" "depend[s] upon distinguishing between homosexual and heterosexual employees, similarly situated," it "cannot survive rational basis review"). For this reason, even accepting *arguendo* that the cost analysis in the Implementation Plan were accurate (*cf.* Carson Decl. ¶¶ 22-23), it cannot justify the categorical bar of transgender people from military service.

Defendants also cannot show how the cost of transition-related treatment could justify a ban on transgender enlistees who have already transitioned. And yet the Implementation Plan completely excludes such enlistees from eligibility.

C. Defendants Have Failed To Demonstrate Any Significant Change In The Harms Plaintiffs Face

This Court has already determined that the ban would cause Plaintiffs to suffer irreparable harms. Enforcement of the implementation plan would cause Plaintiffs to suffer substantially the same harms.

Under the Implementation Plan, the Plaintiffs who are seeking to join the military are barred from doing so. Each of those Plaintiffs has gone through gender

transition and lives in accord with their gender identity, not with their assigned birth sex. The Implementation Plan excludes them from joining the military and thus harms them "in the same fundamental way" as the August 25 Trump Memorandum. *See City of Jacksonville*, 508 U.S. at 662; Implementation Plan, Dkt. 82-3 at 3. "[L]oss of opportunity to pursue one's chosen profession constitutes irreparable harm." *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 978 (9th Cir. 2017).

In addition, Plaintiffs include currently serving members who are transgender and who wish to come out, but who have refrained from doing so for fear of being discharged. (*See* Dkt. 20 ¶ 4.) If enforced, the Implementation Plan would put them in the lose-lose situation of having to choose between military discharge and denial of appropriate medical care, facing irreparable injury either way.

Finally, the Plaintiffs who came out in reliance on the former policy and who are currently serving would suffer irreparable injury even if permitted to remain in the military. Defendants erroneously contend these Plaintiffs would not be harmed because the Implementation Plan creates an "exception" that permits their continued service. (*See* Implementation Plan, Dkt. 83-1 at 3.) But even if these Plaintiffs were permitted to remain, they would be serving on fundamentally unequal terms, thereby subjecting them to an irreparable constitutional harm. In addition, their service would be diminished by the ban under which they serve. The Implementation Plan rests on military policy that deems transgender people burdensome, unstable, and generally unfit to serve. As this Court already concluded, "[t]here is nothing any court can do to remedy a government-sent message that some citizens are not worthy of the military uniform simply because of their gender. A few strokes of the legal quill may easily alter the law, but the stigma of being seen as less-than is not so easily erased." (Order at 20, Dkt. No. 79.)

In addition, even on its face, the Implementation Plan makes clear that any security Plaintiffs may enjoy under that exception is conditional and limited. Unlike all non-transgender service members, these Plaintiffs serve subject to a severance

policy that permits Defendants to terminate their service at any time in the event that it becomes disadvantageous to Defendants' litigation position in this and related matters. (*See* DOD Report, Dkt. 83-2 at 45 (explaining that the grandfathering provision "is and should be deemed severable from the rest of the policy" in the event that it is "used by a court as a basis for invalidating the entire policy").) A "protection" that is contingent on litigation outcomes and subject to revocation at any time does not extinguish Plaintiffs' concrete and irreparable injuries, but prolongs them indefinitely. *See McCormack*, 788 F.3d at 1024 (holding that revocable conditional offer of immunity from prosecution under Idaho statute did not moot plaintiff's constitutional challenge to that statute because threatened injuries continued) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)).[8]

D. Defendants Have Failed To Establish That The Equities And The Public Interest Now Counsel Against Enjoining The Ban

Plaintiffs sought the existing preliminary injunction to preserve the status quo allowing transgender persons to serve in the military on equal terms with others. This Court agreed that the balance of equities favored Plaintiffs, given that "Plaintiffs already feel the stigma attached to" the ban. Order, Dkt. No. 79 at 20; *see also Stone*, 280 F. Supp. 3d at 769 (concluding that there was "considerable

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[8] Also, unlike other service members, Plaintiffs do not have the security of knowing they will be provided with any medically needed care. The DOD Report states that transgender service members who have a military-issued medical diagnosis of gender dysphoria "may continue to receive all medically necessary treatment." (Dkt. No. 83-2 at 45.) However, other provisions reject mainstream medical views on the standard of care for gender transition and the efficacy of that case, particularly for transition-related surgeries. (DOD Report, Dkt No. 83-2 at 24-27 (noting the purported "uncertainty surrounding efficacy of transition-related treatments").) In light of those provisions and of the express intent to deny coverage for transition-related surgeries after March 23, 2018 in the August 25 Trump Memorandum, Plaintiffs have reason to fear that they will be denied some or all medically necessary care.

evidence that . . . the discharge and banning of such individuals" would negatively impact the military) (citing *Doe 1*, 2017 WL 4873042, at *33); *Doe 1 v. Trump*, 2017 WL 6553389, at *3 (D.C. Cir. Dec. 22, 2017) (finding that the ban is "counter to the public interest" because it "would directly impair and injure the ongoing educational and professional plans of transgender individuals and would deprive the military of skilled and talented troops.").

Defendants have not shown that the balance of equities has changed. Plaintiffs continue to face irreparable injury under the Implementation Plan, under which "most transgender individuals either cannot serve or must serve under a false presumption of unsuitability, despite having already demonstrated that they can and do serve with distinction." (PALM Center, Statement of Fifty-Six Retired Generals and Admirals (Aug. 1, 2017), Dkt. No. 28-15 at 2); *see also Doe* 1, 2017 WL 6553389, at *3 ("[I]n the balancing of equities, it must be remembered that all Plaintiffs seek during this litigation is to serve their Nation with honor and dignity[.]"). In contrast, Defendants will not be harmed should the injunction be maintained. Transgender service members and recruits will remain subject to the same standards as others, and the negative impacts of discharging qualified service members, including the cost of recruiting and training replacements, will be avoided while the case proceeds. Defendants cannot identify any specific harms that maintaining the status quo would cause, nor do any exist.

IV. CONCLUSION

Because the Implementation Plan discriminates in the same way as the August 25 Trump Memorandum it executes, Defendants have not and cannot satisfy their burden to establish significant changes in circumstance warranting dissolution of the preliminary injunction. Defendants' Motion should thus be denied.

Dated: April 25, 2018

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ATTESTATION

Pursuant to Civil Local Rule 5-4.3.4(a)(2)(i), I attest under penalty of perjury that I have obtained concurrence and authorization from Enrique Monagas of the California Department of Justice, to affix his electronic signatures to this filing.

Dated: April 25, 2018 By: */s/ Amy C. Quartarolo*
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